

John M. Kelvie

June 19. 1773.

22nd Jan
1773
Refuse

Unto the Right Honourable the Lords of Council and Session,

P E T I T I O N

JOHN M'KELVIE Tanner in Stranraer, Pursuer,

Humbly sheweth,

THAT *John M'Culloch* sailer in *Stranraer* purchased from your petitioner a boat, for the price of which he, on the 10th of May 1771, accepted a bill to the petitioner for L. 35 Sterling, payable seven months after date.

Between the time of the acceptance of this bill, and the term of payment, the petitioner being most seriously apprehensive that his debtor *John M'Culloch* was about to run a very great risk in a certain adventurous kind of traffick, unnecessary to be mentioned, he applied by petition to the justices of peace for the shire of *Galloway*, who ordered *M'Culloch* to be incarcerated until he should find caution to pay the debt when due, or to remain in the country and be liable to the petitioner's diligence when the term of payment of the bill should arrive.

Upon this, *John M'Culloch* senior, indweller in *Stranraer*, and *Andrew M'Culloch* wigmaker there, the father and brother of the sailer, thought

thought proper to interpose in his behalf, and, on condition of his being liberated, they granted a bond of cautionry, of the following tenor:

" We *John M'Culloch* indweller in *Stranraer*, and *Andrew M'Culloch* wigmaker in said burgh, do, by these presents, bind and oblige us, conjunctly and severally, our heirs and successors, as cautioners for *John M'Culloch* sailor in *Stranraer*, that he shall underlie the law, and answer according thereto, in any suit or diligence to be brought against him at the instance of *John M'Kelvie* tanner in *Stranraer*, anent the said *John M'Culloch junior* his making payment to him of the principal sum of thirty-five pounds, Sterling money, and annualrents thereof, contained in, and due by a bill, of date the tenth day of May last past, drawn by the said *John M'Kelvie* upon and accepted by the said *John M'Culloch junior*, and payable seven months after date, and that under the penalty of forty pounds Sterling. Likeas, I the said *John M'Culloch junior*, do hereby bind and oblige me, my heirs and executors, to warrant, free, relieve, and skaithless keep, the said *John M'Culloch senior*, and *Andrew M'Culloch*, my said cautioners, of the cautionry above written, and of all cost, skaith, damage, interest or expence, that they, or either of them, shall sustain or incur through the same."

This bond was written by *Thomas Nasmyth* writer in *Edinburgh*, a person of skill and character, in whom both parties could confide; and it was *bona fide* understood, that the petitioner should be secured against any risk of losing his debt by *John M'Culloch* the sailor's flying or absconding, until it was too late to do diligence against him.

Notwithstanding, however, this security, on the faith of which your petitioner's debtor was liberated, *John M'Culloch* the sailor did not underlie the law, when the time came that your petitioner did diligence against him.

Your petitioner was therefore obliged to bring an action against *John* and *Andrew M'Cullochs* the cautioners, libelling upon the aforesaid bond, and concluding that it should be found and declared, that they had incurred the penalty therein contained, at least to the extent of the aforesaid debt owing by the said *John M'Culloch* sailor to your petitioner; and that therefore they should be decerned and ordained to make payment to your petitioner of the above-mentioned bill, with interest, &c. The summons was executed on the 8th of March 1772.

This action having come before the Lord *Elliot* Ordinary, the defenders allowed decret to go against them in absence. More than three weeks thereafter, they presented a representation; and the Lord Ordinary was pleased, on the 29th July 1775, to appoint parties

July 1.
1772.

July 25.
1772.

ties to be ready to debate against next calling. The petitioner accordingly inrolled his cause, which came on before the Lord Ordinary the 6th of August 1772, when his Lordship was pleased to pronounce this interlocutor: "Appoints parties procurators to be ready to debate against the Lord Ordinary's first side-bar hour in November next."

Aug. 6.
1772.

Parties having been fully heard on the 2d of December 1772, the Lord Ordinary ordered minutes of debate to be made up; and, on the 20th of January 1773, his Lordship was pleased to pronounce the following interlocutor: "Having considered the foregoing minute of debate, with the bond of cautionry libelled; sustains the defences pleaded for John and Andrew McCullochs, defenders, assolizies them from the conclusions of the libel, and decerns."

Dec. 2.
1772.

Jan. 20.
1773.

To which interlocutor his Lordship was pleased to adhere on the 26th February 1773, on advising a representation with answers.

Feb. 26.
1773.

Your petitioner took the liberty to present a second representation, in which he, with all deference, took the liberty to suggest, that he was the less able to urge his request for an alteration, that his Lordship had not been pleased to express the grounds of his interlocutor. Where judgment is pronounced in a publick court, parties have an opportunity of hearing from the bench upon what it is that the cause turns; but when a cause is taken to avizandum, and determined by a judge in his own house, parties must often be at a loss, unless the interlocutor contains the *ratio decidendi*. His Lordship, on the 10th of March 1773, was pleased to refuse the representation, and adhere to his former interlocutor.

March 10.
1773.

The petitioner humbly begs leave to submit his cause to the review of your Lordships. He is here *certain de damno vitando*; and the truth is, that he can very ill afford to lose the value of the bill in question; whereas, he is well assured, that, before granting the bond of cautionry, the defenders took care to get from McCulloch the sailor, a right to bounty-money due to him, far above the value of his bill to your petitioner: But, be this as it may, they ought, with submission, to be compelled to perform their contract.

The defenders, in arguing their cause before the Lord Ordinary, endeavoured to obscure its real merits by stretching their story into periods, both antecedent and posterior to the affair at issue. They gave a history of various transactions of McCulloch the sailor, prior to his incarceration; and they wrangled with unusual keenness with regard to inferences which they were pleased to draw from what they alleged has happened since the cause came into Court. If this petition shall be thought worthy of an answer, it is hoped that the
defenders

defenders will preserve a more accurate chronology, and keep to the neat point of time on which the cause turns.

The bill was payable the 13th of December, and was soon after protested, and the protest registered in the Borough-books of *Stranraer* the 24th of that month. A horning was raised upon it the 7th of January; a charge given the 16th of that month. The horning was denounced at Edinburgh the 1st of February, registered the 3d, and a caption raised the 6th of February. The caption was sent to *Stranraer* to be put in execution, so soon as the debtor could be found; and the petitioner has averred, and offered to prove, that he went with a messenger and two witnesses to the defenders, shewed them the caption, and required them to produce the debtor, that he might put it in execution; but all in vain. The defenders did not produce him, and the petitioner could not find him; surely then they had forfeited their cautionry, that he should underlie the law in any suit or diligence at the petitioner's instance, upon the bill in question.

The petitioner therefore thought himself well entitled in law and justice to bring this action; and although the defenders once affected to doubt his being in earnest in it, they cannot deny that an inhibition was raised upon the dependence, and executed against one of them before the process came into Court; and, ever since it has begun, the records of Court can testify, that it has been carried on with unremitting attention.

The defenders never offered to present your petitioner's debtor till the 30th of September last, when they made a farce of doing it, when they were conscious that it was altogether out of time, as he had long before that reduced himself to beggary by his ruinous projects. The obligation to which the defenders voluntarily subjected themselves on account of their relation, and trusting to which your petitioner's debtor was let out of custody, must receive a rational interpretation. It cannot be understood to mean that they only became bound that the debtor should some time or other of his life, though *etiam in articulo mortis*, or in the wreck of his circumstances, answer to your petitioner's diligence. The meaning certainly was, that he should answer *debito tempore*; nay, that he should answer the moment that ultimate diligence was ready against him.

No objection occurs to the bond itself, so far as your petitioner can conjecture; and therefore he humbly apprehends, that the cause is simply a *questio facti*, Did the defenders produce *John McCulloch* the sailor to your petitioner's diligence, or did they not? They have indeed boldly averred, in page 11th of the minutes, " That the defenders, in order to secure themselves, industriously kept *McCulloch*

“ *loch* from engaging in any other voyage till such time as the pursuer might have it in his power to execute a caption or other diligence against him; but so far was he from taking any step of that kind, that he allowed *M'Culloch* to go about and employ himself as he thought proper, without the least disturbance, except giving him a charge of horning; but for caption, neither *M'Culloch* himself, nor the defenders, ever heard or knew that such a thing was raised, till the commencement of the present process.”

This passage is a judicial acknowledgment that the defenders were conscious of what was incumbent upon them *in order to secure themselves*, as they well express it. But your Lordships will be pleased to observe, that they aver a direct contradiction to what your petitioner can prove to have been the true *res gesta*; viz. That instead of their never hearing of the caption till this process was raised, they were fully certiorated of it, when it was ready to be executed; for after having gone to *M'Culloch* the sailor's house, and found him not there, the petitioner, as has been already mentioned, went with a messenger and two witnesses to the defenders, shewed them the caption, and positively required them to produce the debtor.

Your petitioner will, if necessary, prove what he has set forth; but as, in so small a matter as is here at stake, a proof should not go out unless *cum onere* of the fullest costs to the party who shall be found in the wrong, he does humbly insist before your Lordships as he did before the Lord Ordinary, that if the defenders shall still adhere to the story told by them in their minutes, your Lordships may be pleased to ordain them to confess or deny by a writing under their hands, whether or not the petitioner's caption against *John M'Culloch* the debtor was intimated to them in February 1772, and whether or not they were then required to produce him to the petitioner's diligence.

May it therefore please your Lordships to alter the Lord Ordinary's interlocutor, and decern in the conclusions of the libel; or, before answer, to ordain the defenders to confess or deny by a writing under their hands, whether or not the petitioner's caption against John M'Culloch the debtor was intimated to them in February 1772, and whether or not they were then required to produce him to the petitioner's diligence.

According to justice, &c.

JAMES BOSWELL.

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JAMES NORWELL